RECORD AND BRIEFS

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No. 16-1454

In the Supreme Court of the United States

OHIO, ET AL., PETITIONERS

v.

AMERICAN EXPRESS COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The private respondents operate the American Express credit-card network. In this antitrust enforcement action, the United States and a group of States challenged "anti-steering" rules that respondents impose on merchants that accept American Express cards. Those rules prohibit merchants from encouraging their customers to use other credit cards, which often charge the merchants lower fees. Applying the rule of reason, the district court held that the anti-steering rules violate Section 1 of the Sherman Act, 15 U.S.C. 1. The court found that the rules stifle price competition among credit-card networks, allowing *all* networks to raise their merchant fees and forcing merchants to charge higher prices to retail consumers as a result.

The court of appeals reversed. It did not question the district court's finding that the anti-steering rules thwart price competition, raise merchant fees, and inflate retail prices. But the court emphasized that the credit-card industry is "two-sided," in that networks compete to attract both merchants and cardholders. And the court held that the United States and the States had not made a prima facie showing that the anti-steering rules unreasonably restrain trade because they had not sufficiently demonstrated that the rules harm *cardholders* as well as merchants. The question presented is as follows:

Whether proof that respondents' anti-steering rules thwart interbrand price competition, raise merchant fees, and inflate retail prices was sufficient to make out a prima facie case under the rule of reason.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 838 F.3d 179. The opinion of the district court (Pet. App. 63a-259a) is reported at 88 F. Supp. 3d 143.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2016. A petition for rehearing was denied on January 5, 2017 (Pet. App. 324a-326a). On March 24, 2017, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 5, 2017. On April 24, 2017, Justice Ginsburg further extended the time within which to file a petition to and including June 2, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The private respondents operate one of the country's four major credit-card networks, American Express (Amex). In 2013, the Amex network captured 26.4 percent of all credit-card transaction volume. Pet. App. 13a. The rest was divided among Visa (45 percent), MasterCard (23.3 percent), and Discover (5.3 percent). *Ibid.* Together, the four networks processed nearly $2.4 trillion in credit-card transactions. *Id.* at 74a.

Amex cards are accepted by merchants that account for more than 90 percent of credit-card transactions by dollar value, including virtually all of the country's largest merchants. Pet. App. 188a, 224a. To accept Amex cards, a merchant must enter into a contract with respondents and agree to pay a "merchant discount fee" equal to a percentage of each transaction. *Id.* at 15a. For example, a merchant that accepts an Amex card for a $100 purchase might receive only $97—the purchase price less a three-percent merchant discount fee. Visa and MasterCard also charge merchant discount fees, though their fees are structured somewhat differently because Visa and MasterCard use a different business model. *Id.* at 13a-14a.[1]

Respondents have traditionally charged merchants higher fees than other networks, which respondents use in part to fund rewards and other benefits for Amex cardholders. Pet. App. 68a, 175a-180a. Beginning

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[1] Visa and MasterCard operate "open-loop" systems in which "acquiring" banks act as intermediaries between the credit-card networks and merchants, and "issuing" banks act as intermediaries between the networks and individual cardholders. Pet. App. 13a-14a, 81a-83a (citation omitted). Respondents, in contrast, operate a "closed-loop" system in which they typically maintain direct relationships with cardholders and merchants. *Id.* at 14a-15a, 83a-84a.

around 1990, Visa and MasterCard highlighted their lower fees and urged merchants to encourage their customers to use Visa and MasterCard instead of Amex—for example, by displaying signs stating "We Prefer Visa." *Id.* at 91a-92a. Combined with other marketing strategies, those competitive efforts "were remarkably effective" and caused a substantial drop in respondents' market share. *Id.* at 19a; see *id.* at 92a.

Respondents reacted by tightening the "anti-steering" rules in their merchant contracts to "to stifle any further steering or preference campaigns." Pet. App. 200a, 202a; see *id.* at 19a, 92a-93a. The anti-steering rules bar merchants that accept Amex cards from offering customers discounts or incentives to use other cards, expressing a preference for other cards, or even disclosing their relative costs of accepting different cards. *Id.* at 19a-20a, 100a-101a. The rules prohibit those actions even when a customer does not have an Amex card or presents a different card. *Ibid.* Respondents "actively monitor[]" compliance with the rules and have "vigorously enforce[d]" them to stamp out a variety of attempts by merchants to encourage their consumers to use less-expensive rival cards. *Id.* at 102a-103a; see *id.* at 103a-104a.

2. In 2010, the United States and a group of States sued respondents, along with Visa and MasterCard, alleging that the networks' anti-steering rules unreasonably restrained trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 21a-22a. Visa and MasterCard entered into consent judgments and rescinded their anti-steering rules. *Id.* at 22a. Respondents proceeded to trial. After a seven-week bench trial, the district court held that the anti-steering rules violate Section 1 under the rule of reason. *Id.* at 63a-259a.

a. "The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of [Section] 1." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007). It looks to "the restraint's history, nature, and effect," *ibid.* (citation omitted), and asks whether a restraint "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition," *Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). The plaintiff in a rule-of-reason case bears the initial burden to show that the challenged restraint is "*prima facie* anticompetitive." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 771 (1999). If the plaintiff makes that showing, the burden shifts to the defendant to establish any "procompetitive justification." *Ibid.*; see Pet. App. 108a-109a.

b. The district court began its rule-of-reason analysis by defining the relevant antitrust market, which establishes the "context for the remainder of [the] analysis." Pet. App. 111a; see *id.* at 111a-148a. An antitrust market is defined as those products "that have reasonable interchangeability for the purposes for which they are produced," such that customers would switch from one product to another if faced with a price increase. *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). Here, the district court concluded that the market affected by the anti-steering rules is the market for "general purpose credit and charge card network services" of the type that respondents provide to merchants. Pet. App. 112a-113a.

The district court rejected respondents' contention that this market definition should be expanded to include services to cardholders as well as merchants. Pet. App. 114a-122a. The court agreed with respondents

that the credit-card business is "two-sided," in that credit-card networks compete to attract both merchants and cardholders. *Id.* at 121a-122a; see *id.* at 77a-78a. The court emphasized, however, that the services respondents provide to merchants are not interchangeable with the services they provide to cardholders. *Id.* at 118a-119a.

Although the district court rejected respondents' proposed market definition, it recognized that the "two-sided" nature of respondents' platform is relevant to the antitrust inquiry because "the antitrust significance of a restraint that nominally affects conduct on only one side of [respondents'] platform cannot be assessed without considering its impact on the other side of the platform." Pet. App. 121a-122a. The court thus considered the interdependence between the merchant and cardholder sides of respondents' platform throughout its rule-of-reason analysis. *Ibid.*

c. Under the rule of reason, the plaintiff has two ways of establishing a prima facie case that the challenged restraint adversely affects competition. The indirect method requires a showing that the defendant has market power and that the restraint is potentially anticompetitive. Pet. App. 108a-109a. The direct method requires a showing of "an actual adverse effect on competition." *Id.* at 108a (citation omitted). Here, the district court held that the United States and the States had carried their burden under both methods. *Id.* at 148a-228a.

i. The district court first held that respondents have market power. Pet. App. 148a-191a. The court explained that respondents capture 26.4 percent of the market for network services, a concentrated market with significant barriers to entry. *Id.* at 150a-156a. The

court noted that respondents' market power is magnified by "cardholder insistence"—the fact that many merchants cannot practically refuse to accept Amex cards because many of their customers would shop elsewhere if they did so. *Id.* at 156a-165a. The court also relied on respondents' pricing, including their proven ability to significantly increase fees without causing merchants to stop accepting Amex cards. *Id.* at 165a-180a.

ii. The district court further held, in the alternative, that respondents' anti-steering rules had caused "actual, sustained adverse effects on competition." Pet. App. 193a (citation omitted); see *id.* at 191a-228a. The court found that "[p]rice competition is a critical avenue of horizontal interbrand competition, and yet it is frustrated to the point of near irrelevance in the network services market as a result of [respondents' anti-steering rules]." *Id.* at 195a. The court explained that "[s]teering is a lynchpin to inter-network competition on the basis of price" because, once a merchant decides to accept cards from a particular network, the choice of the card used for a particular transaction lies with the cardholder. *Id.* at 196a. By barring merchants from encouraging cardholders to use less-expensive cards, the anti-steering rules ensure that "there is virtually no check on the networks' incentive or ability to charge higher prices to merchants, so long as the network's pricing is below the level at which a rational merchant would drop acceptance entirely." *Id.* at 197a.

The district court also found that the anti-steering rules "render it nearly impossible" for a new network to enter the market "by offering merchants a low-cost-alternative to the existing networks." Pet. App. 203a. The court explained that Discover had tried to pursue

such a low-fee strategy in the 1990s and had been thwarted by rules that "denied merchants the ability to * * * steer share to Discover's lower-priced network." *Id.* at 205a. Discover therefore had "abandoned its low-price business model" and had raised its merchant fees to align with those charged by Visa and MasterCard. *Id.* at 206a.

The district court further found that, by stifling price competition, the anti-steering rules "allowed all four networks to raise their [merchant] fees more easily and more profitably." Pet. App. 207a; see, *e.g.*, *id.* at 166a-172a (describing respondents' "Value Recapture" initiative, which significantly raised prices over a five-year span without causing merchants to stop accepting Amex cards). The court emphasized that those higher merchant fees had "also resulted in increased prices for consumers" because merchants "pass most, if not all, of their additional costs along to consumers in the form of higher retail prices." *Id.* at 210a-211a.

d. The district court's findings placed on respondents the burden of proving that the anti-steering rules had procompetitive benefits, and the court held that respondents had not carried that burden. Pet. App. 228a-258a. *Inter alia*, the court rejected respondents' contention that the rules are justified to protect Amex's "differentiated business model," which relies on charging higher merchant fees to offer more generous cardholder rewards. *Id.* at 229a-236a. The court held that, to find the anti-steering rules reasonable "because they shield [respondents'] preferred business strategy from a legitimate form of interbrand competition, especially competition on the basis of price, would amount to 'nothing less than a frontal assault on the basic policy of the

Sherman Act.'" *Id.* at 235a (quoting *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978)).

3. The court of appeals reversed and directed the entry of judgment for respondents. Pet. App. 1a-58a.

a. The court of appeals first held that the district court had "erred in excluding the market for cardholders from its relevant market definition." Pet. App. 32a; see *id.* at 31a-40a. The court emphasized the "interdependence" of credit-card networks' competition for merchants and their competition for cardholders, and it stated that separating those two avenues of competition into different antitrust markets could allow "legitimate competitive activities in the market for [cardholders] to be penalized no matter how output-expanding such activities would be." *Id.* at 35a.

b. The court of appeals next held that the district court had erred in holding that respondents have market power. Pet. App. 40a-48a. It concluded that the district court should not have focused on increases in respondents' merchant fees because respondents use a portion of those fees to provide greater cardholder rewards (which provide the functional equivalent of reduced prices for cardholders). *Id.* at 43a-44a. The court stated that the district court should have calculated Amex's "two-sided price"—that is, the aggregate amount charged to both merchants and cardholders. *Id.* at 44a (citation omitted). The court also held that the district court had erred in relying on "cardholder insistence" as evidence of market power. *Id.* at 45a-48a. The court reasoned that cardholders insist on using Amex cards only because they like the rewards and other services that Amex provides, and it believed that "so long as Amex's market share is derived from cardholder satisfaction, there is no reason to intervene." *Id.* at 48a.

c. Finally, the court of appeals held that the district court had erred in holding that the United States and the States had made a prima facie case that the anti-steering rules have an actual adverse effect on competition. Pet. App. 49a-53a. The court did not question the district court's finding that the anti-steering rules stifle price competition among the networks and thereby cause merchants (and their customers) to pay more. But the court held that such harms were insufficient to establish a prima facie case because the district court had "failed to consider the two-sided net price accounting for the effects of the [anti-steering rules] on both merchants and cardholders." *Id.* at 49a. To prove anti-competitive effects in the form of higher prices, the court stated, the United States and the States were required to provide at minimum a "reliable measure of American Express's two-sided price that appropriately account[ed] for the value or cost of the rewards paid to cardholders." *Id.* at 53a (citation omitted). The court also stated that the United States and the States bore the "initial burden" to show that the anti-steering rules "made *all* Amex consumers on both sides of the platform —*i.e.*, both merchants and cardholders—worse off overall." *Id.* at 51a.

4. The court of appeals denied the United States' petition for rehearing and rehearing en banc. Pet. App. 324a-326a.

ARGUMENT

Petitioners contend (Pet. 18-25, 30-35) that the district court's findings established a prima facie case that the anti-steering rules unreasonably restrain trade, and that the court of appeals erred in holding otherwise. The United States agrees. The court of appeals seriously departed from sound antitrust principles, and its

decision leaves in place restraints that thwart price competition in an important sector of the economy and inflate the retail prices paid by all consumers.

Nonetheless, the United States has not sought this Court's review because the case does not satisfy the Court's traditional certiorari standards. See Sup. Ct. R. 10. The court of appeals rested its decision almost entirely on the "two-sided" nature of the credit-card industry, and neither this Court nor any other circuit has squarely considered the application of the antitrust laws to two-sided platforms as such. Consistent with its usual practice of awaiting further percolation in the lower courts before taking up such novel legal issues, the Court should deny review here.

1. The district court found that respondents' anti-steering rules stifle competition among credit-card networks, thereby increasing merchant fees, blocking low-cost competitors, and inflating the retail prices paid by all consumers. Although the court of appeals did not overturn any of those findings, it concluded that they do not establish even a prima facie case of an antitrust violation because (a) the relevant market must be defined to include cardholders as well as merchants, and (b) proof that a restraint thwarts competition and inflates prices on one side of a two-sided market is insufficient to establish a prima facie case that it unreasonably restrains trade. As petitioners explain (Pet. 18-25), both of those holdings were wrong.[2]

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[2] The court of appeals also held that the United States and the States had failed to establish a prima facie case under the indirect method because respondents do not have market power. Pet. App. 40a-48a. Petitioners do not seek further review of that holding. See Pet. i, 18-25.

a. A rule-of-reason analysis focuses on the relevant antitrust market, which is "the area of effective competition" directly and immediately affected by the challenged restraint. *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957). An antitrust market is "composed of products that have reasonable interchangeability for the purposes for which they are produced." *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (citation omitted); see, *e.g.*, *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992); *United States* v. *Continental Can Co.*, 378 U.S. 441, 449 (1964). "Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the 'relevant market' rests on a determination of available substitutes." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J.), cert. denied, 479 U.S. 1033 (1987). The market thus "must be drawn narrowly" to include only products that are reasonable substitutes. *Times-Picayune Publ'g Co.* v. *United States*, 345 U.S. 594, 612 n.31 (1953); see 2B Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 565a, at 430 (4th ed. 2014) ("[A] relevant market consists only of goods that are reasonably close *substitutes* for one another.").

The court of appeals articulated the correct legal standard, explaining that the relevant antitrust market should be defined to include "products 'reasonably interchangeable by consumers for the same purposes.'" Pet. App. 32a (citation omitted). But the court never explained how the services that respondents provide to merchants are "reasonably interchangeable" with the services that respondents provide to cardholders. They

are not. A retailer facing an increase in respondents' merchant fees could not, for example, avoid those fees by becoming an Amex cardholder instead of a merchant that accepts Amex cards.

Rather than faithfully applying the "reasonably interchangeable" standard, the court of appeals emphasized that respondents' competition for merchants and their competition for cardholders are interdependent. Thus, the court of appeals observed that "the price charged to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand." Pet. App. 39a. But as petitioners explain (Pet. 20-21), it is common for prices in one market to affect prices in another. That sort of indirect effect does not mean that the relevant products are reasonably interchangeable or that they should be collapsed into a single market for purposes of antitrust analysis. See, *e.g.*, *Eastman Kodak*, 504 U.S. at 463, 481-482 (distinguishing the markets for photocopier replacement parts and services from the market for photocopiers). "[T]he fact that a firm obtains its profits from two different, non-substitutable groups does not serve to place the two groups into the same market." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 565, at 104 (Supp. 2017) (Areeda & Hovenkamp).

The court of appeals also placed great weight on the fact that the credit-card industry is two-sided, so that networks must attract both merchants and cardholders in order to succeed. Pet. App. 39a-40a. But where, as here, the different sides of a firm's two-sided platform involve distinct competition and products that are not substitutes, they are properly analyzed as separate antitrust markets. That point is well illustrated by this

Court's decision in *Times-Picayune Publishing*, which involved a newspaper publisher's requirement that advertisements appear in both its morning and evening papers. The Court explained that "every newspaper is a dual trader in separate though interdependent markets" serving advertisers and readers—that is, that the publisher in effect had a two-sided platform. 345 U.S. at 610. But because the challenged restraint "concern[ed] solely one of these markets," the Court limited the relevant market to reasonable substitutes for newspaper advertising; it did not treat the two sides of the platform taken together as a single market. *Ibid.*; see *id.* at 612 & n.31.

Like the markets for newspaper advertisers and readers, the markets for merchants and cardholders are distinct spheres of competition, "involving different sets of rivals and the sale of separate, though interrelated, products and services to separate groups of consumers." Pet. App. 119a. By collapsing the two into a single antitrust market, the court of appeals severed market definition from its purpose and "prevent[ed] the relevant-market inquiry from accurately answering the questions for which it is asked." Law Professor Amicus Br. 5.

b. Even under the court of appeals' flawed definition of the relevant antitrust market, the district court's findings were sufficient to establish a prima facie case that the anti-steering rules unreasonably restrain competition.

i. Respondents' anti-steering rules are vertical restraints subject to the rule of reason, rather than to the per se rule that is often applied to horizontal restraints. Pet. App. 29a-30a. But unlike resale-price-maintenance agreements and many other vertical restraints, the anti-steering rules do not "reduc[e] *intra*brand competition

—the competition among retailers selling the same brand"—in order to "stimulate *inter*brand competition." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 890 (2007) (emphases added); see, *e.g.*, *State Oil Co.* v. *Khan*, 522 U.S. 3, 14-15 (1997). Instead, the purpose and effect of the anti-steering rules is to suppress *inter*brand competition between respondents and their rival credit-card networks by making it impossible for merchants to encourage consumers to use cards that cost the merchants less. To that end, the anti-steering rules restrict not simply the merchants' interactions with Amex customers, but their pricing and other behavior towards non-Amex customers as well.

The district court's extensive factual findings describe the unsurprising results of suppressing price competition among competing credit-card networks. The anti-steering rules "create a competitive environment in which there is virtually no check on the networks' incentive or ability to charge higher prices to merchants," so long as a network's prices remain below the level that would cause the merchant to stop accepting its cards altogether. Pet. App. 197a. The record demonstrates that the rules blocked Discover's low-cost strategy and prevented merchants from steering their customers to use lower-cost cards. *Id.* at 201a-202a, 208a-209a. As a result, the anti-steering rules "have allowed all four networks to raise their swipe fees." *Id.* at 207a; see, *e.g.*, *id.* at 166a-172a. Those higher fees, in turn, have resulted in "higher retail prices" for consumers—including both consumers who use Amex cards and those who do not. *Id.* at 210a-211a. The financial impact on Amex cardholders is offset, at least in part, by respondents' cardholder rewards. *Ibid.* But consumers who use cash, debit cards, and lower-reward

credit cards—who tend to be less affluent—also face higher retail prices yet "do not receive any of the premium rewards or other benefits conferred by American Express on the cardholder side of its platform." *Id.* at 211a.

ii. The court of appeals deemed those findings legally insufficient to establish even a prima facie case that the anti-steering rules unreasonably restrain trade because—in the court's view—they did not adequately account for the anti-steering rules' purported benefits to Amex cardholders. At times, the court appeared to fault the United States and the States for failing to account for all possible procompetitive benefits of the anti-steering rules at the first step of the burden-shifting framework. For example, the court stated that the United States and the States bore the "initial burden" of "show[ing] that the [anti-steering rules] made *all* Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." Pet. App. 51a; see *id.* at 49a n.52 (faulting the district court for "fail[ing] to take into account offsetting benefits to cardholders"); *id.* at 54a (requiring proof of "net harm" to cardholders and merchants).

To the extent that the court of appeals' opinion can be read to require antitrust plaintiffs to account for a restraint's potential procompetitive benefits in establishing a prima facie case, it seriously distorted the burden-shifting framework that governs rule-of-reason litigation. Under that framework, a plaintiff carries its initial burden by showing that the challenged restraint is "*prima facie* anticompetitive." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 771 (1999). That showing "place[s] the burden of procompetitive justification on [the defendant]," *ibid.*, which is responsible for establishing

any "legitimate justifications," *FTC* v. *Actavis, Inc.*, 133 S. Ct. 2223, 2236 (2013); see Areeda & Hovenkamp ¶ 1505, at 171 ("The defendant, being the author of the restraints, is in a better position to explain why they are profitable and in consumers' best interests."). Under established law, it is thus the defendant's burden to establish a challenged restraint's procompetitive benefits, not the plaintiff's initial burden to anticipate and refute them.[3]

iii. The court of appeals' opinion is also susceptible to a narrower reading, under which the court deemed the district court's factual findings insufficient to make out a prima facie case under the particular theory that the court of appeals understood the United States and the States to have advanced here. The court of appeals stated that the United States and the States could have carried their burden of proving actual anticompetitive effects by showing "that cardholders engaged in fewer credit-card transactions (*i.e.*, reduced output), that card services were worse than they might otherwise have been (*i.e.*, decreased quality), or that Amex's pricing was set above competitive levels within the credit-card industry (*i.e.*, supracompetitive pricing)." Pet. App. 52a. The court understood the United States and the States to have relied on supracompetitive pricing, but it

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[3] In one sentence of its opinion, the court of appeals acknowledged that "[w]hether the [anti-steering rules] had pro-competitive effects on cardholders—let alone whether any alleged procompetitive effects on cardholders outweigh 'anticompetitive' effects on merchants—has no bearing on whether [the United States and the States] carried their initial burden." Pet. App. 51a. That statement, however, came only two sentences after the court's assertion that the United States and the States bore the "initial burden" of "show[ing] that the [anti-steering rules] made *all* Amex consumers on both sides of the platform * * * worse off overall." *Ibid.*

deemed proof of inflated prices charged to *merchants* insufficient because—in the court's view—the relevant market includes cardholders as well.

The court of appeals stated, for example, that the district court had "failed to consider the two-sided net price accounting for the effects of the [anti-steering rules] on both merchants and cardholders." Pet. App. 49a. The court emphasized that "the revenue earned from merchant fees funds cardholder benefits," which effectively reduce prices on the cardholder side of the market. *Id.* at 50a. The court concluded that the United States and the States could not carry their burden of showing actual anticompetitive effects using evidence of increased prices absent "a reliable measure of [respondents'] two-sided price that appropriately accounts for the value or cost of the rewards paid to cardholders." *Id.* at 53a (citation omitted).

The court of appeals erred in holding that proof that the anti-steering rules block competition and inflate fees charged to merchants was insufficient to establish a prima facie case absent evidence of an increase in respondents' "two-sided" price. Federal antitrust law "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). Preserving interbrand price competition is especially important because price is the "central nervous system of the economy," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940), and "competitive pricing [is] the free market's means of allocating resources." *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 23 (1979).

Indeed, the "Sherman Act was enacted to assure customers the benefits of price competition." *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 538 (1983).

Given the central importance of price competition to the antitrust laws, the district court's finding that the anti-steering rules blocked such competition and inflated prices charged to merchants was sufficient to establish a prima facie case that the rules unreasonably restrain trade. "Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984). The district court's factual findings establish that, at a minimum, respondents' anti-steering rules had an actual adverse effect on competition on the merchant side of the two-sided market identified by the court of appeals. Although we are not aware of any prior decision squarely addressing the issue, such a showing of adverse effects on competition in one side of a two-sided market should suffice to establish a prima facie case even absent proof that the challenged restraint increased the defendant's aggregate or "two-sided" price.[4]

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[4] In fact, the United States and the States showed—and the district court found—that the higher merchant fees made possible by respondents' anti-steering rules "were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders." Pet. App. 209a. The anti-steering rules thus *did* "result[] in a higher net price" on both sides of respondents' platform. *Ibid.*; see *id.* at 166a-167a ("Because [respondents'] Value Recapture initiatives were not paired with offsetting adjustments on the cardholder side of the platform, the resulting increases in merchant pricing are properly viewed as changes to the net price charged across Amex's integrated platform.").

Respondents are free to charge higher merchant fees in order to fund more generous cardholder rewards. Under the antitrust laws, however, that strategy must succeed or fail under conditions of market competition. As the district court explained, the Sherman Act "does not permit [respondents] to decide on behalf of the entire market which legitimate forms of interbrand competition should be available and which should not." Pet. App. 240a; accord Areeda & Hovenkamp ¶ 1505, at 170. Yet that is exactly what the court of appeals allowed: Respondents' anti-steering rules have essentially forced the entire credit-card industry to channel competition away from merchant fees and into cardholder rewards. Even if price competition on the cardholder side of the market entirely offset the higher merchant fees—which it did not, see note 4, *supra*—restraints that create such a substantial distortion in market competition are properly viewed as at least prima facie anticompetitive. The court of appeals erred in holding otherwise.

2. Although the court of appeals' decision was erroneous, this case does not satisfy this Court's traditional standards for certiorari. See Sup. Ct. R. 10. Most importantly, the court of appeals' decision does not directly conflict with any decision of this Court or another court of appeals. This Court has decided antitrust cases involving two-sided platforms, including *Times-Picayune Publishing*. But the Court has not squarely considered questions of market-definition or proof of anticompetitive effects in cases involving two-sided platforms as such. And so far as we are aware, no other court of appeals has specifically considered the application of the Sherman Act to two-sided platforms either.

In addition, the scope of the court of appeals' decision is unclear. *Inter alia*, the court emphasized that

"[m]arket definition is a deeply fact-intensive inquiry," and it did not suggest that its holding in this case would extend to *all* cases involving industries that might be described as two-sided. Pet. App. 32a (citation omitted). To the contrary, the court distinguished an earlier decision in which it had defined *separate* markets for cardholders and merchants in the very industry that is at issue here. *Id.* at 33a-36a (citing *United States* v. *Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), cert. denied, 543 U.S. 811 (2004)); see *id.* at 35a ("The relevant market in this case is not the same as the relevant market in *Visa*.").[5]

Further percolation in the lower courts may be especially useful because of the idiosyncratic character of the agreements at issue here. Because Amex and the merchants that accept Amex cards stand in a vertical rather than a horizontal relationship, the parties and the courts below treated those contracts as vertical agreements subject to rule-of-reason analysis. Those agreements also have a meaningful horizontal aspect, however, since they restrict the terms on which merchants may deal with non-Amex as well as Amex customers and effectively prevent price competition among competing credit-card networks. See pp. 13-15, *supra*.

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[5] The only district court that has applied the court of appeals' decision to a purportedly two-sided market concluded that "[t]he relevant market for purposes of antitrust analysis may not be two-sided even though the defendant operates a two-sided platform." *US Airways, Inc.* v. *Sabre Holding Corp.*, No. 11-cv-2725, 2017 WL 1064709, at *8 (S.D.N.Y. Mar. 21, 2017), appeal pending, No. 17-960 (2d Cir. docketed Apr. 5, 2017). That court upheld a jury's finding that the market at issue was one-sided, concluding that the court of appeals' decision in this case "does not invalidate the jury's finding of a one-sided market * * * in a different industry and with very different facts." *Id.* at *10.

The agreements therefore might roughly be analogized to contracts in which a manufacturer forbids retailers to charge more for the manufacturer's goods than for specified goods obtained from the manufacturer's competitors. To date, however, there is no meaningful body of precedent addressing the antitrust status of agreements of that character.

If the court of appeals adheres to the approach it followed here—and particularly if it reads the decision below broadly—this Court's intervention may be warranted in an appropriate future case. But the Court ordinarily awaits the development of a conflict among the lower courts before exercising its certiorari jurisdiction. At minimum, that course will allow the Second Circuit to clarify the scope and content of its holding. And if this Court's review is ultimately warranted, additional percolation in the lower courts may assist the Court in its application of general antitrust principles to two-sided platforms and to agreements of the sort at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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